U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 10 December 2004

Case No. 2003-BLA-5750

In the Matter of:
EUGENE FELTNER,
Claimant,

v.

WHITAKER COAL CO., INC.,
Employer,

and
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,
Party-in-Interest.

BEFORE: THOMAS F. PHALEN, JR.
Administrative Law Judge

APPEARANCES:
Edmond Collett, Esq.
On behalf of Claimant

Lois A. Kitts, Esq.
On behalf of Employer

DECISION AND ORDER – DENIAL OF BENEFITS

This is a decision and order arising out of a claim for benefits under Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended by the Black Lung Benefits Act of 1977, 30 U.S.C. §§ 901-962, ("the Act") and the regulations thereunder, located in Title 20 of the Code of Federal Regulations. Regulation section numbers mentioned in this Decision and Order refer to sections of that Title.[1]

[1] The Department of Labor amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 65 Fed. Reg. 80, 045-80,107 (2000)(to be codified at 20 C.F.R. Parts 718, 722, 725 and 726). On August 9, 2001, the United States District Court for the District of Columbia issued a Memorandum and Order upholding the validity of the new regulations. All citations to the regulations, unless otherwise noted, refer to the amended regulations.

On March 24, 2003, this case was referred to the Office of Administrative Law Judges by the Director, Office of Workers' Compensation Programs, for a hearing. (DX 32).[2] A formal hearing on this matter was conducted on November 20, 2003, in Hazard, Kentucky by the undersigned Administrative Law Judge. All parties were afforded the opportunity to call and to examine and cross examine witnesses, and to present evidence, as provided in the Act and the above referenced regulations.

ISSUES[3]

The issues in this case are:

1. Whether the claim was timely filed;

2. Whether the Miner has pneumoconiosis as defined by the Act;

3. Whether the Miner's pneumoconiosis arose out of coal mine employment;

4. Whether the Miner is totally disabled;

5. Whether the Miner's disability is due to pneumoconiosis;[4] and

6. Whether the Claimant has established a material change in conditions.[5]

(DX 32).

Based upon a thorough analysis of the entire record in this case, with due consideration accorded to the arguments of the parties, applicable statutory provisions, regulations, and relevant case law, I hereby make the following:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

[2] In this Decision, "DX" refers to the Director's Exhibits, "EX" refers to the Employer's Exhibits, "CX" refers to the Claimant's Exhibits, and "Tr." refers to the official transcript of this proceeding.

[3] Whether the miner worked at least 17 years in or around one or more coal mines; whether the person upon whose disability the claim is based is a miner; whether the miner worked as a miner after December 31, 1969; whether the claimant has 1 dependent for purpose of augmentation, whether the named employer is the Responsible Operator; and whether the miner's most recent period of cumulative employment of not less than one year was with the named Responsible Operator, were withdrawn at the hearing. (Tr. 10). Also, Employer listed other issues that will not be decided by the undersigned; however, they are preserved for appeal. (Item 18(B) DX 32).

[4] This issue was not marked on DX 32, but was added at the hearing. (Tr. 11).

[5] Since withdrawal of Claimant's 1988 claim was approved by the District Director, Officer of Workers' Compensation, the instant claim is a subsequent claim because more than one year has elapsed between the prior denial and the filing of this claim. *See* ALJ 2.

Background

Eugene Feltner ("Claimant") was born on May 19, 1943; he was 60 years-old at the time of the hearing. (DX 3; Tr. 14). He completed the sixth grade. (DX 3; Tr. 15). In 1965, he married Rosetta (Lewis) Feltner. (DX 3; Tr. 14-15). Claimant has no dependent children under the age of 18. (DX 3; Tr. 14-15). I find that Claimant has one dependent for purposes of augmentation.

On his application for benefits, Claimant stated that he engaged in coal mine employment for 21 years. (DX 3). Claimant's last coal mine employment was working as a general laborer. (DX 5; Tr. 18). With exception of one year, his coal mine employment was all underground. (Tr. 17). His specific tasks included shoveling belt lines, operating a head drive, dusting rock, running a miner, and serving as a motor man. (DX 5; Tr. 18). Claimant describes the physical requirements of the work to include standing for 8-12 hours per day and lifting and carrying 50-75 pounds several times per day. (DX 5; Tr. 18). Claimant last worked in and around coal mines on January 9, 1987, but he quit due to disability. (DX 1, 3, 6; Tr. 18-20). He received State Worker's Compensation benefits between 1988 and 1996 for his disability due to coal workers' pneumoconiosis ("CWP"). (DX 3; Tr. 23).

Procedural History

Claimant filed his first claim for benefits under the Act on June 21 1973. (DX 1). That claim was finally denied by the Social Security Administration Bureau of Disability Insurance on July 9, 1974. It was denied by an Administrative law judge from the Social Security Administration on December 17, 1974, and by an Appeals Council on March 14, 1975. Claimant elected review of his claim under the 1977 amendments to the Act and the Social Security Administration issued a final denial on March 14, 1979. The Department of Labor then considered the claim and finally denied it on December 14, 1979.

Claimant filed a subsequent claim for benefits on October 14, 1988, and the Director issued a Proposed Decision and Order – Denial of Benefits on March 21, 1989. (DX 1). Claimant requested a formal hearing, ultimately resulting in a denial of benefits by Administrative Law Judge Donald Mosser on August 1, 1991. Claimant appealed to the Benefits Review Board ("Board") who remanded to Judge Mosser for reconsideration. On October 6, 1993, Judge Mosser issued a Decision and Order – Denial of Benefits which was affirmed by the Board on February 17, 1995. Claimant timely filed a request for modification which was denied by the Director in a Proposed Decision and Order – Denial of Benefits dated September 7, 1995. Claimant requested a formal hearing, but Judge Mosser instead considered the claim on the record. On January 6, 1997, Judge Mosser denied Claimant's request for modification, and his Decision and Order was affirmed by the Board on December 23, 1997. Claimant again requested a modification of his claim, which was denied by the director on July 2, 1998. After a formal hearing, Administrative Law Judge Daniel J. Roketenetz denied Claimant's modification request, and this Decision and Order was affirmed by the Board on September 25, 2000. Claimant made his final modification request in 2000, and was denied by the Director in a Proposed Decision and Order on February 2, 2001. On February 9, 2001, Claimant motioned for a voluntary withdrawal of his claim which was approved by the Director in a Proposed Decision

and Order dated February 13, 2001. Employer responded by requesting reconsideration, asking that only the last modification request be allowed to be withdrawn, but that all prior history of the 1988 claim remain on the record and not be considered to have never been filed. This request was denied by the Director on March 6, 2001. Employer did not appeal the February 13, 2001 Director's decision.

Claimant filed his instant claim for benefits on March 22, 2001. (DX 2). On January 15, 2003, the Director issued a Proposed Decision and Order – Denial of Benefits. (DX 27). On January 21, 2003, Claimant requested a formal hearing. (DX 28). On April 18, 2003, this matter was transferred to the Office of the Administrative Law Judges. (DX 36).

On October 24, 2003, Employer filed a motion for remand, or in the alternative, Summary Judgment on the issue as to whether this claim is a modification request rather than a new filing, citing *Clevenger v. Mary Helen Coal Co*., 22 B.L.R. 1-183 (2002)(*en banc*). (ALJ 2). The undersigned concluded that Employer's motion had already been answered by the Director since the claim had been transferred to the Office of Administrative Law Judges as a subsequent claim. Concerning the *Clevenger* issue, the undersigned found that while the Director's allowance of Claimant's withdrawal of the 1988 claim would be in conflict with the Board's holding, The Director's March 2001 Proposed Decision and Order predated *Clevenger* by almost one-and-one half years. Also, since the Board did not state that the Clevenger holding was to apply retroactively, and Employer failed to appeal or request modification of the Director's decision in a timely manner, the undersigned affirmed the voluntary withdrawal of the 1988 claim. As a result, the October 14, 1988 claim will be considered not to have been filed under §725.306 (b). Therefore, the instant claim is adjudicated as a subsequent claim because more than one year has elapsed between the denial of the June 21, 1973 claim and this claim.

Length of Coal Mine Employment

The parties have stipulated that the Claimant worked at least 17 years in or around one or more coal mines. (DX 32). I find that the record supports this stipulation, (DX 3-8), and therefore, I hold that the Claimant worked at least 17 years in or around one or more coal mines.

Claimant's last employment was in the Commonwealth of Kentucky; (DX 4), therefore, the law of the Sixth Circuit is controlling. [6]

Responsible Operator

Liability under the Act is assessed against the most recent operator which meets the requirements of §§ 725.494 and 725.495. The District Director identified Whitaker Coal Co., Inc. as the putative responsible operator. (DX 19, 27). Whitaker Coal Co., Inc. does not contest this issue. (DX 32). After review of the record, I find that Whitaker Coal Co., Inc. is properly designated as the responsible operator in this case.

[6] Appellate jurisdiction with a federal circuit court of appeals lies in the circuit where the miner last engaged in coal mine employment, regardless of the location of the responsible operator. *Shupe v. Director, OWCP*, 12 B.L.R. 1-200 (1989)(en banc).

Timeliness

According to §725.308(c), there are two requirements to prove that a miner's claim is untimely. First, a claim for benefits under the Act must be filed within three years after a medical determination of total disability due to pneumoconiosis. Second, the determination must be communicated to the miner. Also, claims for benefits under the Act are accorded a statutory presumption of timeliness. § 725.308(c).

The Sixth Circuit and the Board have also weighed in on this issue. In *Sharondale Corp. v. Ross*, 42 F.3d 993 (6th Cir. 1994), the Court held that the time period in which a miner must file for benefits, under § 725.308(a), starts after each denial of a previous claim, provided that the miner works in the coal mines for a substantial period of time after the denial and a new medical opinion of total disability due to pneumoconiosis is communicated. *Sharondale*, 42 F.3d at 996. Ross, the claimant, was initially denied benefits under the Act in 1981. He began working again as a coal miner before quitting in 1983. He filed a duplicate claim in 1985. Accordingly, the Sixth Circuit found that Ross' claim was timely filed. In *Sharondale*, the Sixth Circuit explicitly declined to hold that the statute of limitations only applied to the filing of initial claims. *Id.* The Sixth Circuit found it's holding to be dictated by the progressive nature of pneumoconiosis and logic, since it would make no sense to allow serial applications for benefits and then limit the ability to file serial applications to three years. *Id.*

The Sixth Circuit again addressed the application of § 725.308 in *Tennessee Consolidated Coal Co. v. Kirk*, 264 F.3d 602 (6th Cir. 2001). Beginning in 1979, Kirk filed three claims for benefits, all of which were denied. *Kirk*, 264 F.3d at 604. He filed his fourth duplicate claim in 1992 and was awarded benefits. *Id.* The Sixth Circuit found that Kirk's 1992 claim was timely filed, stating:

> [t]he three-year statute of limitations clock begins to tick the first time that a miner is told by a physician that he is totally disabled by pneumoconiosis. This clock is not stopped by the resolution of the miner's claim or claims, and, pursuant to *Sharondale*, the clock may only be turned back if the miner returns to the mines after a denial of benefits. There is thus a distinction between premature claims that are unsupported by a medical determination, like Kirk's 1979, 1985, and 1988 claims, and those claims that come with or acquire such support. Medically supported claims, even if ultimately deemed "premature" because the weight of the evidence does not support the elements of the miner's claim, are effective to begin the statutory period.

Id. at 608. The Sixth Circuit stated that Kirk's three prior denials did not trigger the statute of limitations because they were premature filings, noting that previous medical opinions did not conclusively opine that Kirk was totally disabled due to pneumoconiosis. Then the Court referenced its unpublished decision in *Clark v. Karst-Robbins Coal Co.*, No. 93-4173, 1994 WL 709288 (6th Cir. 1994), where it rejected a successful state workers' compensation claim that

relied upon a finding that the claimant became permanently and totally disabled as the result of the occupational disease of pneumoconiosis as a "medical determination."

The Sixth Circuit addressed the timeliness issue again in reaching their unpublished decision in *Peabody Coal Co. v. Director, OWCP [Dukes]*, 48 Fed.Appx. 140, 2002 WL 31205502 (6th Cir. October 2, 2002)(unpublished). Between 1987 and 1988, Dukes received several opinions from physicians that he was suffering from pneumoconiosis. He filed a claim for benefits under the Act in 1988, which was denied by a Department of Labor claims examiner. Dukes did not appeal and never returned to coal mining. In 1995 he filed a duplicate claim and was awarded benefits. The Sixth Circuit engaged in a thorough and complete analysis of the three-year statute of limitations, wherein they characterized their holding in *Kirk* as a finding that no "medical determination" exists absent a valid medical opinion, notwithstanding prior knowledge or existence of the disease. *Dukes*, 48 Fed.Appx. at 144. In reliance on *Kirk* and paying deference to the remedial intent of Congress in creating the Act, the court held that the three-year statute of limitations applies to subsequent claims. *Id.* at 145.

Next, the Sixth Circuit stated that the three-year statute of limitations is not triggered by undiagnosed cases of pneumoconiosis, self-diagnosed cases, and (relying on *Sharondale*) "all situations in which the miner has filed a claim but has not yet contracted the disease - including claims filed on the basis of a misdiagnosis." *Id.* In light of the denial of Dukes' 1988 claim, the Sixth Circuit found, for legal purposes, that Duke's condition was misdiagnosed. The Sixth Circuit then agreed with and adopted the reasoning behind the Tenth Circuit Court of Appeals' decision that a "final finding by an Office of Workers' Compensation Program adjudicator that the claimant is not totally disabled due to pneumoconiosis repudiates any earlier medical determination to the contrary and renders prior medical advice to the contrary ineffective to trigger the running of the statute of limitations." *Id.*, citing to *Wyoming Fuel Co. v. Director, OWCP [Brandolino]*, 90 F.3d 1502, 1507 (10th Cir. 1996). The Sixth Circuit stated that a misdiagnosis does not equate to a medical determination. *Dukes*, 48 Fed.Appx. at 146. In a restatement of it's holding, the Sixth Circuit stated, "if a miner's claim is ultimately rejected on the basis that he does not have the disease, this finding necessarily renders any prior medical opinion to the contrary invalid, and the miner is handed a clean slate for statute of limitations purposes." *Id.* Effectively, a "proper medical determination" is required to trigger the statute of limitations. *Id*.

After the Sixth Circuit determined that a misdiagnosis does not trigger the statute of limitations, it addressed the apparent conflict with its holding in *Kirk*.

In *Kirk*, we stated in dicta that:

> Medically supported claims, even if ultimately deemed "premature" because the weight of the evidence does not support the elements of the miner's claim, are effective to begin the statutory period. Three years after such a determination, a miner who has not subsequently worked in the mines will be unable to file any further claims against his employer, although, of course, he may continue to pursue pending claims.

> However, we decided *Kirk* on the basis that the miner there did not have a medically supported claim. Today, we have carefully considered this issue and hold otherwise.

Id.

The Board, however, has addressed this issue. In *Furgerson v. Jericol Mining, Inc.,* BRB Nos. 03-0798 BLA and BLA-A (Sept. 20, 2004), the Board vacated the Administrative Law Judge's finding that a physician's opinion did not commence the running of the limitations period at §725.308 after applying *Dukes*. The Board held that it was improper for the Administrative Law Judge to apply the *Dukes* holding, "the statute of limitations is not triggered by a medical determination submitted in conjunction with a claim that is ultimately denied as that opinion would be in error." Rather, the Board concluded that the published panel decision in *Kirk* was controlling and it directed that "the administrative law judge must determine if (the physician) rendered a well-reasoned diagnosis of total disability due to pneumoconiosis such that his report constitutes a 'medical determination of total disability due to pneumoconiosis which has been communicated to the miner'" under §725.308 of the regulations.

Considering the facts of this claim, in response to Employer's interrogatories, Claimant stated he had not been advised by any physicians that he was totally disabled due to CWP prior to the May 23, 2001 signing of his responses. (DX 6). Claimant testified that in relation to the instant claim, Drs. Baker and Hussain were the first physicians to tell him that he was 100% disabled. (Tr. 21-22). They examined Claimant in 2001 in relation to this claim. (DX 14, 14). Claimant, however, also testified that he was told by Dr. Glen Baker that he was totally disabled due to pneumoconiosis in 1986, (Tr. 22-23), but continued to work until 1987. (DX 2).

The Claimant's hearing testimony establishes that a diagnosis of total disability due to pneumoconiosis was clearly articulated to Mr. Feltner on several occasions. The conflict with the regulations, however, arises when trying to prove a medical diagnosis of total disability due to pneumoconiosis within three years of filing the instant claim.

Concerning the 2001 diagnoses, since the instant claim was filed in 2003, Dr. Baker's and Dr. Hussain's communications would not fall outside the three-year limitations period. As a result, even if it is found that the 2001 diagnoses of total disability due to pneumoconiosis are reasoned, the claim would not be considered untimely.

On the other hand, the alleged 1986 diagnosis of total disability due to pneumoconiosis by Dr. Baker would fall 17 years prior to the instant claim, and thus would violate the regulatory requirements. But there are several problems with this diagnosis. First, there is no evidence in the record concerning a 1986 evaluation by Dr. Baker. Looking to *Furgerson* for guidance, the Board held that I must determine if the physician who communicated total disability due to pneumoconiosis to the miner rendered a well-reasoned diagnosis. Without access to Dr. Baker's report, this is not possible. Second, while the record in the 1988 claim includes four diagnoses of total disability due to pneumoconiosis, including two in 1986, due to Claimant's approved withdrawal of the 1988 claim, I am not permitted to review these opinions to determine their

reasonableness. Also, Claimant did not testify as to whether these four additional diagnoses were communicated to him. Third, even if I were able to review Dr. Baker's 1986 diagnosis, or the two additional 1986 diagnoses found in the 1988 claim, there is some question as to whether Claimant's continued employment until January 9, 1987 would invalidate the running of the statue of limitations.

In *Sharondale*, *Kirk*, and *Dukes*, the Sixth Circuit has repeatedly addressed the affect of returning to work after a diagnosis of total disability due to pneumoconiosis, and the resulting effect such a return has on triggering the statute of limitations. In *Sharondale*, the Court stated that if a miner "works in the coal mines for a substantial period of time after the denial and a new medical opinion of total disability due to pneumoconiosis is communicated, then the limitations period begins after each denial of a previous claim. 42 F.3d at 996. In that case, however, the court determined that two years of additional work satisfied the "substantial period" requirement, and reset the miner's statute of limitations. In *Kirk*, the court stated that, pursuant to *Sharondale*, "the clock may only be turned back if the miner returns to the mines after the denial of benefits." 264 F.3d at 608. In *Dukes*, the court reiterated *Kirk* by stating, "[t]hree years after [a denial of benefits], a miner who has not subsequently worked in the mines will be unable to file any further claim against his employer." 48 Fed.Appx at 146. Finally, in *Furgerson*, the Board did not address the issue of subsequent work.

While *Sharondale* appears to apply an evaluative approach to the topic of subsequent work after a diagnosis of total disability due to pneumoconiosis, *Kirk* and *Dukes* apply a more black letter standard to such a return. Accordingly, based on the recency of *Kirk* and *Dukes*, the Sixth Circuit appears to have adopted the position that a return to work after a diagnosis of total disability due to pneumoconiosis stops the commencement of the limitations period. Applying this to the instant facts, all of the diagnoses of total disability due to pneumoconiosis prior to January 9, 1987, would not initiate the running of the statue of limitations. As a result, only the two post-1987 opinions included in the 1988 claim, if reasoned, would be admissible for purposes of determining timeliness of the instant claim. But, as stated above, the record in the 1988 claim is not reviewable, and there is no evidence that those diagnoses were ever communicated to Claimant.

Finally, despite Claimant's testimony that a diagnosis of total disability was communicated to him more than three years prior to the filing of the instant claim, I find this claim is timely. I reach this conclusion after considering the evidentiary deficiencies outlined above in the framework of subsection 308(c)'s statutory presumption of timeliness. I find that the Employer has failed to rebut this presumption, and therefore, this claim will not be dismissed because of a failure to meet the requirements of subsection 308(a).

MEDICAL EVIDENCE

Section 718.101(b) requires any clinical test or examination to be in substantial compliance with the applicable standard in order to constitute evidence of the fact for which it is proffered. *See* §§ 718.102 - 718.107. The claimant and responsible operator are entitled to submit, in support of their affirmative cases, no more than two chest x-ray interpretations, the results of no more than two pulmonary function tests, the results of no more than two blood gas

studies, no more than one report of each biopsy, and no more than two medical reports. §§ 725.414(a)(2)(i) and (3)(i). Any chest x-ray interpretations, pulmonary function studies, blood gas studies, biopsy report, and physician's opinions that appear in a medical report must each be admissible under § 725.414(a)(2)(i) and (3)(i) or § 725.414(a)(4). §§ 725.414(a)(2)(i) and (3)(i). Each party shall also be entitled to submit, in rebuttal of the case presented by the opposing party, no more than one physician's interpretation of each chest x-ray, pulmonary function test, arterial blood gas study, or biopsy submitted, as appropriate, under paragraphs (a)(2)(i), (a)(3)(i), or (a)(3)(iii). §§ 725.414(a)(2)(ii), (a)(3)(ii), and (a)(3)(iii). Notwithstanding the limitations of §§ 725.414(a)(2) or (a)(3), any record of a miner's hospitalization for a respiratory or pulmonary or related disease, or medical treatment for a respiratory or pulmonary or related disease, may be received into evidence. § 725.414(a)(4). The results of the complete pulmonary examination shall not be counted as evidence submitted by the miner under § 725.414. § 725.406(b).

Claimant selected Dr. Imtiaz Hussain to provide his Department of Labor sponsored complete pulmonary examination. (DX 10, 33). Dr. Hussain conducted the examination on July 20, 2001. I admit Dr. Hussain's report under § 725.406(b). I also admit Dr. Sargent's quality-only interpretation of the chest x-ray under § 725.406(c). (DX 14).

Claimant completed a Black Lung Benefits Act Evidence Summary Form. (CX 2). Claimant designated Dr. Glen Baker's complete pulmonary evaluation conducted on March 28, 2001. Claimant's evidence complies with the requisite quality standards of §§ 718.102-107 and the limitations of § 725-414 (a)(3). Therefore, I admit the evidence Claimant designated in its summary form.

Employer completed a Black Lung Benefits Act Evidence Summary Form. (EX 5). Employer designated Dr. Dahhan's complete pulmonary examination conducted on August 28, 2001, and Dr. Broudy's complete pulmonary examination conducted on October 2, 2003. Employer included Dr. Hayes' reading of the March 28, 2001 x-ray, and Dr. Scott's' reading of the July 20, 2001 x-ray as rebuttal evidence. Also, Employer included Dr. Rosenberg's review of the PFT studies conducted by Drs. Hussain and Baker, as rebuttal evidence. Next, Employer included Dr. Rosenberg's review of the ABG studies conducted by Drs. Hussain and Baker, as rebuttal evidence. In addition, Employer included Hospitalization and treatment notes from Christian Healthcare Services, Inc., dated 1995-2000. Finally, in support of its submissions, Employer included a deposition from Dr. Hayes. With exception of the treatment records,[7] Employer's evidence complies with the requisite quality standards of §§ 718.102-107 and the limitations of § 725.414(a)(3). Therefore, I admit the evidence Employer has designated in its

[7] The hospital treatment records submitted by Employer consisted entirely of chest x-rays taken over a 5 year period preceding the hearing. All of the records reported that the films were clear of any definite alveolar processes, and only the July 31, 1998 film showed hyperaerated lungs. There is no evidence in the record as to the x-ray reading credentials of these physicians. Also, these interpretations were all related to the treatment of Claimant's condition, and not for the purpose of determining the existence or extent of pneumoconiosis. Finally, there is no record of the film quality for any of these x-rays. As a result, despite the fact that the records submitted by the Employer unanimously suggest no pneumoconiosis, the x-ray results are not in compliance with the quality standards of §718.102 and Appendix A to Part 718. Therefore, while these records are admissible under the limitations of § 725.414(a)(3), I accord the x-ray interpretations contained in the hospital treatment records no weight for the purpose of determining whether Claimant suffers from pneumoconiosis under § 718.202(a)(1).

summary form. Employer also motioned that it be allowed to take and submit depositions from Drs. Rosenberg, Broudy, and Dahhan, post-hearing. In an Order dated November 5, 2003, under the discretion accorded by §725.458, the undersigned denied Employer's motions. (ALJ 2). At the hearing, Employer again moved the undersigned for a continuance so that the depositions could be taken, and again the motion was denied. (Tr. 11-13). Employer's objection was noted for appeal purposes. (Tr. 13).

X-RAYS

Exhibit	Date of X-ray	Date of Reading	Physician / Credentials	Interpretation
DX 12	03/28/01	03/28/01	Baker[8]	1/2 pp
DX 15	03/28/01	08/14/01	Hayes[9], BCR, B-reader	Negative
DX 14	07/20/01	07/20/01	Hussain	2/2 ps
DX 14	07/20/01	07/31/01	Sargent, BCR[10], B-reader[11]	Quality only
DX 17	07/20/01	06/21/02	Scott, BCR, B-reader	Negative
DX 16	08/28/01	08/28/01	Dahhan, B-reader	Negative
EX 1	10/02/03	10/02/03	Broudy, B-reader	0/1 pq

PULMONARY FUNCTION TESTS

Exhibit/ Date	Co-op./ Undst./ Tracings	Age/ Height[12]	FEV_1	FVC	MVV	FEV_1/ FVC	Qualifying Results
DX 12	Not noted/	57	3.46	4.53	126	76	No[13]

[8] At the time the x-ray reading, Dr. Baker did not hold B-reader x-ray interpretation credentials. But the June 7, 2004 "B-reader" list states that he was a B-reader from February 1, 1993 to January 31, 2001, and again from June 1, 2002 to present. Also, he is listed as an A-reader from February 1, 2001 to May 31, 2002.

[9] Dr. Hayes was deposed by the Employer on November 13, 2003. (EX 6). He reiterated the findings of his written report, but added that while the x-ray was a grade-2 film quality due to a slight malpositioning of the x-ray tube, this was a very minor technical flaw that did not significantly impede his ability to read the film.

[10] A physician who has been certified in radiology or diagnostic roentgenology by the American Board of Radiology, Inc., or the American Osteopathic Association. *See* 20 C.F.R. § 727.206(b)(2)(III). The qualifications of physicians are a matter of public record at the National Institute of Occupational Safety and Health reviewing facility at Morgantown, West Virginia.

[11] A "B" reader is a physician who has demonstrated proficiency in assessing and classifying x-ray evidence of pneumoconiosis by successful completion of an examination conducted by or on behalf of the Department of Health and Human Services. This is a matter of public record at HHS National Institute for Occupational Safety and Health reviewing facility at Morgantown, West Virginia. (42 C.F.R. § 37.5l) Consequently, greater weight is given to a diagnosis by a "B" Reader. *See Blackburn v. Director, OWCP*, 2 B.L.R. 1-153 (1979).

[12] I must resolve the height discrepancy recorded on the pulmonary function tests. *Protopappas v. Director, OWCP*, 6 B.L.R. 1-221 (1983). At the hearing, Claimant testified that he was 70 inches tall. (Tr. 14). Also, Dr. Dahhan stated in his medical report that Claimant is 67.5 inches tall, which is inconsistent with the height recorded on his PFT report. Therefore, I find that the miner's actual height is 70 inches.

[13] Dr. Rosenberg, an internist and pulmonologist, reviewed this PFT and confirmed Dr. Baker's evaluation. (EX 3, 4).

3/28/01	Not noted/ Yes	70”					
DX 14 07/20/01	Good/ Good/ Yes	58 71”	3.41	4.48	**81**	76.1	No[14]
DX 16 08/28/01	Poor/ Good/ Yes	58 66.7”	**1.48** **1.81***	3.93 3.73*	**88** 91*	**38** **49***	Yes[15]
EX 1 10/2/03	Fair/ Fair/ Yes	60 70”	3.59	4.49	107	80	No

* post-bronchodilator values

ARTERIAL BLOOD GAS STUDIES

Exhibit	**Date**	**pCO_2**	**pO_2**	**Qualifying**
DX 12	3/28/01	35	85	No[16]
DX 14	7/20/01	33.3 34*	82 105*	No[17]
DX 16	8/28/01	38.4 35.5*	76 96.4*	No
EX 1	10/2/03	38.3	76.2	No

*post-exercise values

Narrative Reports

Dr. Glen R. Baker Jr., an internist and pulmonologist, examined the Claimant on March 28, 2001. (DX 12). Based on symptomatology (daily sputum, cough, shortness of breath, and wheezing), employment history (21 years coal mine experience, operating a belt line and running a supply motor, quitting in 1987), individual history (pneumonia on two or three occasions, treatment for coughing up blood in association with respiratory tract infections and hard coughing, prior hospitalization due to shortness of breath, hypertension), family history (nonspecific lung trouble), physical examination (lungs clear, no rales or wheezes noted), smoking history (smoked on and off for 21 years at a rate of ½ to 1 pack per day, quitting in 1967), chest x-ray (1/2), PFT (normal), and an ABG (normal), Dr. Baker diagnosed coal worker’s pneumoconiosis based on the x-ray and coal dust exposure and chronic bronchitis based on history of symptoms. According to Dr. Baker, since Claimant’s FEV 1 and vital capacity were both greater than 80% of predicted, Claimant suffers from a Class I impairment based on the Guides to the Evaluation of Permanent Impairment, 5th Edition. He also found that

[14] Dr. Rosenberg reviewed this PFT and confirmed Dr. Hussain’s evaluation. (EX 3).

[15] Both the pre and post-bronchodilator studies were invalidated by Dr. Dahhan due to poor effort. (DX 16).

[16] Dr. Rosenberg reviewed this ABG and confirmed Dr. Baker’s evaluation. (EX 3).

[17] Dr. Rosenberg reviewed this ABG and confirmed Dr. Hussain’s evaluation. (EX 3).

Claimant suffered a second impairment based on Section 5.8, pg. 106 of the guide. He explained that the guide concludes that persons with conditions such as Claimants should limit further exposure to coal dust. Dr. Baker opined that the guide "implies" that the Claimant was 100% occupationally disabled. Considering Claimant's 21 year exposure to coal dust and 21 pack year smoking history, Dr. Baker opined that there was no other condition to account for the x-ray findings. As a result, Dr. Baker concluded that this impairment was caused at least in part by coal dust exposure.

Dr. Imtiaz Hussain, an internist and pulmonologist, examined the Claimant on July 20, 2001. (DX 14; CX 1). Based on symptomatology (sputum, wheezing, dyspnea, cough), employment history (20 years in coal mine employment), individual history (tuberculosis), family history (high blood pressure, tuberculosis, diabetes, cancer, asthma, and emphysema), no smoking history, physical examination (illegible), chest x-ray (2/2), PFT (normal), ABG (normal), and an EKG (normal), Dr. Hussain diagnosed pneumoconiosis due to dust exposure. But, despite this moderate impairment, Dr. Hussain opined that Claimant retains the respiratory capacity to perform the work of a coal miner or to perform comparable work in a dust-free environment.

Dr. Abdul Dahhan, an internist and pulmonologist, examined the Claimant on August 28, 2001. (DX 16). He reviewed symptomatology (cough, sputum, wheezing, and dyspnea on exertion), employment history (21 years as an underground coal miner, ending in 1987, operating a continuous miner, a supply motor, and shoveling the belt), individual history (daily cough, sputum, wheezing, dyspnea on exertion, and hypertension), smoking history (26 years at ½ to 1 pack per day), physical examination (no relevant findings), chest x-ray (negative), PFT (invalid due to poor effort), ABG (normal), and an EKG (regular sinus rhythm with a pattern of left anterior hemi block).[18] Dr. Dahhan found that there was insufficient objective data to justify the diagnosis of CWP or other pulmonary impairment based on the normal clinical examination of the chest, normal spirometry when Claimant produced valid studies, normal lung volumes and diffusion capacity, normal ABG values at rest and after exercise, and a negative x-ray reading. Also, he stated that there were no objective findings to indicate any pulmonary impairment or disability based on the normal clinical and physiological parameters of Claimant's respiratory system. He opined that from a respiratory standpoint, Claimant retains the physiological capacity to continue his previous coal mining work or a job of comparable physical demand since he has no objective findings to indicate any pulmonary impairment or disability. Finally, he concluded that there was no evidence of pulmonary impairment or disability caused by, contributed to or aggravated by the inhalation of coal dust or CWP, based on the various data generated from his examination as well as the other evidence he reviewed.[19]

[18] Also, Dr. Dahhan considered Dr. Baker's March 28, 2001 medical report, a January 8, 1999 chest x-ray as read by Dr. Hayes, an August 29, 1999 chest x-ray as read by Dr. Hayes, a February 10, 2000 chest x-ray as read by Dr. Hayes, his own previous reports dated June 29, 1998 and February 21, 1996, Dr. Bushey's report dated January 3, 1998, Dr. Varghese's treatment record from 1995, Dr. Cook's treatment records from 1987 through 1991, Chest x-rays spanning from 1994 to 1999 that were all read to have no active disease by a radiologist at Christian Healthcare Services, and treatment records from 1993 through 2000 from Christian Healthcare Services.

[19] The other evidence Dr. Dahhan relied on to make this final determination is identified in note 18 above. Only the treatment records from Christian Healthcare Services was designated on Employers Black Lung Benefits Act Evidence Summary Form, and admitted into adjudication of this claim. The remainder of the evidence in this list is inadmissible, as it exceeds the limitations of § 725.414(a)(3). Since it is not possible to determine the amount

Dr. Bruce Broudy, an internist and pulmonologist, examined Claimant on October 2, 2003. Based on symptomatology (wheezing, cough, daily sputum, chest pains, and sleeping trouble), employment history (21 years underground coal mining doing a variety of work, quitting in 1987), individual history (tuberculosis and pneumonia), smoking history (26 years at a rate of ½ to 1 pack per day, quitting in 1987), physical examination (clear), chest x-ray (0/1), PFT (normal), and an ABG (mild hypoxemia), Dr. Broudy diagnosed dyspnea of a non-pulmonary origin. Furthermore, he did not believe that Claimant had CWP, silicosis, or any chronic lung disease caused by the inhalation of coal mine dust. As a result, Dr. Broudy opined that Claimant retains the respiratory capacity to perform the work of an underground coal miner or to do similarly arduous manual labor.

Hospitalization Records and Treatment Notes

Employer submitted hospital treatment records from the Christian Healthcare Services, Inc. (DX 11). These records consisted of six chest x-rays. The July 31, 1998 x-ray showed hyperaerated lungs, but was otherwise clear. The February 10, 2000, August 27, 1999, February 23, 1996, August 16, 1995, and May 17, 1995 x-rays were all determined clear of any definite alveolar processes.

Smoking History

In response to Employer's interrogatories, Claimant stated that he smoked ½ pack of cigarettes per day, on and off from 1968 to 1987, or 10.5 pack years. (DX 6). Claimant testified that he smoked over a period of 21 years, but quit 16 years prior to the hearing. (Tr. 16-17). All told, Claimant testified that he only smoked about 15 or 16 of the 21 years, at a rate of ½ pack per day during the week and a pack per day on the weekends, which equates to 10.26 pack years.[20] (Tr. 17). Dr. Baker reported that Claimant smoked on and off for 21 years at a rate of ½ to 1 pack per day, quitting in 1987. (DX 12). Dr. Hussain reported that Claimant has never smoked. (DX 14). Dr. Dahhan reported 26 pack years. (DX 16). Dr. Broudy reported 21years of smoking at a rate of ½ to 1 pack per day, quitting in 1987. (EX 1). The smoking history reported by the doctor's medical reports supports Claimant's testimony. Also, I find his testimony more detailed, and thus a more accurate account of his smoking history. Therefore, I find Claimant has a 10.26 pack year history, but he quit in 1987.

DISCUSSION AND APPLICABLE LAW

Mr. Feltner's claim was made after March 31, 1980, the effective date of Part 718, and must therefore be adjudicated under those regulations. To establish entitlement to benefits under Part 718, Claimant must establish, by a preponderance of the evidence, that he:

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of reliance Dr. Dahhan placed on the impermissible evidence, I find this final conclusion cannot be given probative weight in my analysis of the elements of entitlement.

[20] ½ pack per day multiplied by five days, plus one pack per day multiplied by two days, equals 4.5 packs per week. 4.5 packs per week multiplied by 52 weeks equals 234 packs per year. 234 packs per year multiplied by 16 years equals 3,744 total packs. 3,744 total packs divided by 365 days equals 10.26 pack years.

1. Is a miner as defined in this section; and

2. Has met the requirements for entitlement to benefits by establishing that he:

(i) Has pneumoconiosis (see § 718.202), and

(ii) The pneumoconiosis arose out of coal mine employment (see § 718.203), and

(iii) Is totally disabled (see § 718.204(c)), and

(iv) The pneumoconiosis contributes to the total disability (see § 718.204(c)); and

3. Has filed a claim for benefits in accordance with the provisions of this part.

Section 725.202(d)(1-3); *see also* §§ 718.202, 718.203, and 718.204(c).

Subsequent Claim

The provisions of § 725.309 apply to new claims that are filed more than one year after a prior denial. Section 725.309 is intended to provide claimants relief from the ordinary principles of *res judicata*, based on the premise that pneumoconiosis is a progressive and irreversible disease. *See Lukman v. Director, OWCP*, 896 F.2d 1248 (10th Cir. 1990); *Orange v. Island Creek Coal Company*, 786 F.2d 724, 727 (6th Cir. 1986); § 718.201(c) (Dec. 20, 2000). The amended version of § 725.309 dispensed with the material change in conditions language and implemented a new threshold standard for the claimant to meet before the record may be reviewed *de novo*. Section 725.309(d) provides that:

> If a claimant files a claim under this part more than one year after the effective date of a final order denying a claim previously filed by the claimant under this part, the later claim shall be considered a subsequent claim for benefits. A subsequent claim shall be processed and adjudicated in accordance with the provisions of subparts E and F of this part, except that the claim shall be denied unless the claimant demonstrates that one of the applicable conditions of entitlement (see § 725.202(d) miner. . .) has changed since the date upon which the order denying the prior claim became final. The applicability of this paragraph may be waived by the operator or fund, as appropriate. The following additional rules shall apply to the adjudication of a subsequent claim:
>
> (1) Any evidence submitted in conjunction with any prior claim shall be made a part of the record in the subsequent claim, provided that it was not excluded in the adjudication of the prior claim.
>
> (2) For purposes of this section, the applicable conditions of entitlement shall be limited to those conditions upon which the prior denial was based. For example, if the claim was denied solely on the basis that the individual was not a

> miner, the subsequent claim must be denied unless the individual worked as a miner following the prior denial. Similarly, if the claim was denied because the miner did not meet one or more of the eligibility criteria contained in part 718 of the subchapter, the subsequent claim must be denied unless the miner meets at least one of the criteria that he or she did not meet previously.
>
> (3) If the applicable condition(s) of entitlement relate to the miner's physical condition, the subsequent claim may be approved only if new evidence establishes at least one applicable condition of entitlement. . . .
>
> (4) If the claimant demonstrates a change in one of the applicable conditions of entitlement, no findings made in connection with the prior claim, except those based on a party's failure to contest an issue, shall be binding on any party in the adjudication of the subsequent claim. However, any stipulation made by any party in connection with the prior claim shall be binding on that party in the adjudication of the subsequent claim.

Section 725.309(d) (April 1, 2002).

Claimant's prior claim was denied by the Department of Labor on the grounds that he had failed to prove that he had pneumoconiosis. (DX 1). The December 14, 1979 decision, however, did not address the issue of total disability due to pneumoconiosis. Therefore, I find that Claimant failed to establish any of the elements of entitlement in his prior claim. Consequently, the Claimant must establish, by a preponderance of the newly submitted evidence, the presence of pneumoconiosis, that pneumoconiosis was caused by coal mine employment, or the existence of a totally disabling respiratory impairment caused by pneumoconiosis. If Claimant is able to prove any of these elements, then he will avoid having his subsequent claim denied on the basis of the prior denial.

Pneumoconiosis

Claimant may establish a material change in conditions by proving the existence of pneumoconiosis under § 718.202. Claimant has the burden of proving the existence of pneumoconiosis, as well as every element of entitlement, by a preponderance of the evidence. *See Director, OWCP v. Greenwich Collieries*, 512 U.S. 267 (1994).

Pneumoconiosis is defined by the regulations:

> (a) For the purpose of the Act, "pneumoconiosis" means a chronic dust disease of the lung and its sequelae, including respiratory and pulmonary impairments, arising out of coal mine employment. This definition includes both medical, or "clinical" pneumoconiosis and statutory, or "legal" pneumoconiosis.
>
> (1) *Clinical Pneumoconiosis*. "Clinical pneumoconiosis" consists of those diseases recognized by the medical community as pneumoconiosis, i.e., conditions characterized by permanent deposition of substantial amounts of

> particulate matter in the lungs and the fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment. This definition includes, but is not limited to, coal workers' pneumoconiosis, anthracosilicosis, anthracosis, anthrosilicosis, massive pulmonary fibrosis, silicosis or silicotuberculosis, arising out of coal mine employment.
>
> (2) *Legal Pneumoconiosis*. "Legal pneumoconiosis" includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. This definition includes, but is not limited to, any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment.
>
> (b) For the purposes of this section, a disease "arising out of coal mine employment" includes any chronic pulmonary disease or respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment.
>
> (c) For purposes of this definition, "pneumoconiosis" is recognized as a latent and progressive disease which may first become detectable only after the cessation of coal mine dust exposure.

Sections 718.201(a-c).

Section 718.202(a) sets forth four methods for determining the existence of pneumoconiosis.

(1) Under § 718.202(a)(1), a finding that pneumoconiosis exists may be based upon x-ray evidence. The record contains six interpretations of four chest x-rays, and one quality-only interpretation. Dr. Baker interpreted the March 28, 2001 film as positive for pneumoconiosis. Dr. Hayes, a physician dually-certified as a radiologist and B-reader, interpreted the film as negative for pneumoconiosis. I accord greater probative weight to the negative interpretation of Dr. Hayes in comparison to the contrary interpretation of Dr. Baker based on Dr. Hayes' superior credentials. Therefore, the March 28, 2001 film is negative for pneumoconiosis.

Dr. Hussain interpreted the July 20, 2001 film as positive for pneumoconiosis. Dr. Scott, a physician dually-certified as a radiologist and B-reader, interpreted the film as negative for pneumoconiosis. I accord greater probative weight to the negative interpretation of Dr. Scott in comparison to the contrary interpretation of Dr. Hussain based on Dr. Scott's superior credentials. Therefore, the July 20, 2001 film is negative for pneumoconiosis.

Dr. Dahhan, a B-reader, interpreted the August 28, 2001 chest x-ray as negative for pneumoconiosis. There were no positive readings. Therefore, I find the August 28, 2001 film to be negative for the disease.

Dr. Broudy, a B-reader, gave the October 2, 2003 chest x-ray a 0/1 pq rating for pneumoconiosis. A 1/0 rating is the minimum reading under the regulations that will support a finding of pneumoconiosis. §718.102(b). There were no additional readings. Therefore, I find that the October 2, 2003 film does not support a finding of pneumoconiosis.

I have determined that all four of the x-rays in evidence are negative or non-qualifying for pneumoconiosis. Also, all of the physicians with superior x-ray reading credentials determined the films to be negative or non-qualifying, while only the two lesser certified physicians found pneumoconiosis. As a result, I find that the preponderance of the chest x-ray evidence establishes that there is no pneumoconiosis. Therefore, I find that Claimant has failed to establish the presence of pneumoconiosis under subsection (a)(1).

(2) Under § 718.202(a)(2), a determination that pneumoconiosis is present may be based, in the case of a living miner, upon biopsy evidence. The evidentiary record does not contain any biopsy evidence. Therefore, I find that the Claimant has failed to establish the existence of pneumoconiosis through biopsy evidence under subsection (a)(2).

(3) Section 718.202(a)(3) provides that pneumoconiosis may be established if any one of several cited presumptions are found to be applicable. In this case, the presumption of § 718.304 does not apply because there is no evidence in the record of complicated pneumoconiosis. Section 718.305 is not applicable to claims filed after January 1, 1982. Finally, the presumption of § 718.306 is applicable only in a survivor's claim filed prior to June 30, 1982. Therefore, Claimant cannot establish pneumoconiosis under subsection (a)(3).

(4) The fourth and final way in which it is possible to establish the existence of pneumoconiosis under § 718.202 is set forth in subsection (a)(4) which provides in pertinent part:

> A determination of the existence of pneumoconiosis may also be made if a physician, exercising sound medical judgment, notwithstanding a negative x-ray, finds that the miner suffers or suffered from pneumoconiosis as defined in § 718.201. Any such finding shall be based on electrocardiograms, pulmonary function studies, physical performance tests, physical examination, and medical and work histories. Such a finding shall be supported by a reasoned medical opinion.

§ 718.202(a)(4).

This section requires a weighing of all relevant medical evidence to ascertain whether or not the claimant has established the presence of pneumoconiosis by a preponderance of the evidence. Any finding of pneumoconiosis under § 718.202(a)(4) must be based upon objective medical evidence and also be supported by a reasoned medical opinion. A reasoned opinion is one which contains underlying documentation adequate to support the physician's conclusions. *Fields v. Island Creek Coal Co.*, 10 B.L.R. 1-19, 1-22 (1987). Proper documentation exists where the physician sets forth the clinical findings, observations, facts, and other data on which he bases his diagnosis. *Oggero v. Director, OWCP*, 7 B.L.R. 1-860 (1985). A brief and

conclusory medical report which lacks supporting evidence may be discredited. *See Lucostic v. United States Steel Corp.*, 8 B.L.R. 1-46 (1985); *see also*, *Mosely v. Peabody Coal Co,.* 769 F.2d 257 (6th Cir. 1985). Further, a medical report may be rejected as unreasonable where the physician fails to explain how his findings support his diagnosis. *See Oggero*, 7 B.L.R. 1-860.

The newly submitted evidentiary record contains four narrative medical opinions by examining physicians. Dr. Baker examined Claimant, and based on an x-ray and exposure he diagnosed pneumoconiosis, and based on history of symptoms, he diagnosed chronic bronchitis. While Dr. Baker set forth clinical observations and findings, I find his reasoning is not supported by adequate data. First, the x-ray reading he relied on was re-read as negative by a more qualified reader. Second, concerning chronic bronchitis, an analysis of history of symptoms is not objective. Finally, the PFT, ABG, and physical examination he relied upon were all non-qualifying under Department of Labor standards, leaving as the only objective evidence the x-ray interpretation and the history of coal dust exposure. The Sixth Circuit Court of Appeals has held that merely restating an x-ray is not a reasoned medical judgment under § 718.202(a)(4). *Cornett v. Benham Coal, Inc.*, 227 F.3d 569 (6th Cir. 2000). The Board has also explained that, when a doctor relies solely on a chest x-ray and coal dust exposure history, a doctor's failure to explain how the duration of a miner's coal mine employment supports his diagnosis of the presence or absence of pneumoconiosis renders his opinion "merely a reading of an x-ray . . . and not a reasoned medical opinion." *Taylor v. Brown Bodgett, Inc.*, 8 B.L.R. 1-405 (1985). *See also Worhach v. Director, OWCP*, 17 B.L.R. 1-105, 1-110 (1993)(citing *Anderson v. Valley Camp of Utah, Inc.*, 12 B.L.R. 1-111, 1-113 (1989)(it is permissible to discredit the opinion of a physician which amounts to no more than a restatement of the x-ray reading). Therefore, based on the precedent of *Cornett* and *Taylor*, Dr. Baker's report, despite his credentials as an internist and pulmonologist, is not a reasoned medical opinion for the purposes of determining the presence of pneumoconiosis under subsection (a)(4).

Dr. Hussain determined that based on the chest x-ray and Claimant's history of coal dust exposure, that Claimant was moderately impaired due to pneumoconiosis. Also, Dr. Hussain's x-ray reading was re-interpreted by a more qualified physician and found to be negative for the disease. The remainder of the objective testing was either non-qualifying or revealed insignificant results. Therefore, based on the precedent of *Cornett* and *Taylor*, Dr. Hussain's report, despite his credentials as an internist and pulmonologist, is not a reasoned medical opinion for the purposes of determining the presence of pneumoconiosis under subsection (a)(4).

Dr. Dahhan's and Dr. Broudy's medical opinions are supported by the objective data they utilized to diagnose whether Claimant suffered from pneumoconiosis. As a result, I find their reports well-documented and well-reasoned. Bolstered by their credentials as internists, pulmonologists, and B-readers, I accord their conclusions substantial probative weight.

The record contains two reasoned and documented medical opinion, both concluding that Claimant does not suffer from clinical or legal pneumoconiosis. Furthermore, even without Dr. Dahhan's and Dr. Broudy's reports, I found that the two medical reports concluding pneumoconiosis were unreasoned. As a result, I find that the Claimant has failed to establish the presence of pneumoconiosis by a preponderance of the evidence under subsection (a)(4).

Claimant has failed to establish the presence of pneumoconiosis under subsection (a)(1)-(4). Therefore, after weighing all evidence of pneumoconiosis together under §718.202 (a), I find that Claimant has failed to establish the presence of pneumoconiosis.

The newly submitted evidentiary record does not establish the presence of pneumoconiosis. Claimant may still prevent his subsequent claim from being denied on the basis of the prior denial by establishing the existence of a totally disabling respiratory or pulmonary impairment.

Total Disability

Claimant may also establish a material change in conditions by demonstrating that he is totally disabled from performing his usual coal mine work or comparable work due to pneumoconiosis under one of the five standards of § 718.204(b) or the irrebuttable presumption referred to in § 718.204(b). The Board has held that under § 718.204(b), all relevant probative evidence, both like and unlike must be weighed together, regardless of the category or type, in the determination of whether the Claimant is totally disabled. *Shedlock v. Bethlehem Mines Corp.*, 9 B.L.R. 1-195 (1986); *Rafferty v. Jones & Laughlin Steel Corp.*, 9 B.L.R. 1-231 (1987). Claimant must establish this element of entitlement by a preponderance of the evidence. *Gee v. W.G. Moore & Sons*, 9 B.L.R. 1-4 (1986).

I have determined that Claimant has not established that he suffers from complicated pneumoconiosis. Therefore, the irrebuttable presumption of § 718.304 does not apply.

Total disability can be shown under § 718.204(b)(2)(i) if the results of pulmonary function studies are equal to or below the values listed in the regulatory tables found at Appendix B to Part 718. Considering the newly submitted evidence, only Dr. Dahhan's report on August 28, 2001 produced values equal to or below those found in Appendix B of Part 718. Dr. Dahhan, however, invalidated his own study due to poor effort by the Claimant. Also, a review of the PFT studies, both before and after the August 28, 2001 PFT, demonstrates constantly higher, non-qualifying values. Therefore, I find that Claimant has failed to establish the existence of total disability under subsection (b)(2)(i).

Total disability can be demonstrated under § 718.204(b)(2)(ii) if the results of arterial blood gas studies meet the requirements listed in the tables found at Appendix C to Part 718. Considering the newly submitted evidence, all four of the ABGs failed to produce values that meet the requirements of the tables found at Appendix C to Part 718. Therefore, I find that Claimant has failed to establish the existence of total disability under subsection (b)(2)(ii).

Total disability may also be shown under § 718.204(b)(2)(iii) if the medical evidence indicates that Claimant suffers from cor pulmonale with right-sided congestive heart failure. The record does not contain any evidence indicating that Claimant suffers from cor pulmonale with right-sided congestive heart failure. Therefore, I find that Claimant has failed to establish the existence of total disability under subsection (b)(2)(iii).

Section 718.204(b)(2)(iv) provides for a finding of total disability if a physician, exercising reasoned medical judgment based on medically acceptable clinical or laboratory diagnostic techniques, concludes that a miner's respiratory or pulmonary condition prevented the miner from engaging in his usual coal mine employment or comparable gainful employment. Claimant's usual coal mine employment as a general laborer included standing for 8-12 hours per day and lifting and carrying 50-75 pounds several times per day. (DX 5; Tr. 18).

The exertional requirements of the claimant's usual coal mine employment must be compared with a physician's assessment of the claimant's respiratory impairment. *Cornett v. Benham Coal, Inc.*, 227 F.3d 569 (6th Cir. 2000). Once it is demonstrated that the miner is unable to perform his usual coal mine work, a *prima facie* finding of total disability is made and the party opposing entitlement bears the burden of going forth with evidence to demonstrate that the miner is able to perform "comparable and gainful work" pursuant to § 718.204(b)(1). *Taylor v. Evans & Gambrel Co.*, 12 B.L.R. 1-83 (1988). Nonrespiratory and nonpulmonary impairments have no bearing on establishing total disability due to pneumoconiosis. § 718.204(a); *Jewell Smokeless Coal Corp. v. Street*, 42 F.3d 241 (1994). All evidence relevant to the question of total disability due to pneumoconiosis is to be weighed, with the claimant bearing the burden of establishing by a preponderance of the evidence the existence of this element. *Mazgaj v. Valley Camp Coal Co.*, 9 B.L.R. 1-201 (1986).

There are four narrative medical reports in the record, as summarized above. Dr. Baker is the only physician of record to conclude that Claimant is totally disabled due to pneumoconiosis. He based his diagnosis on an x-ray, a normal PFT, a normal ABG, and a non-significant clinical examination. Dr. Baker stated that considering the FEV1 and vital capacity values of the PFT, Claimant was 100 % occupationally disabled. He reached this conclusion based on his finding that Claimant has a Class I impairment as classified in the Guide to Evaluation of Permanent Impairment, 5th Edition.[21] According to Dr. Baker, the guide concludes that persons with pneumoconiosis should limit further exposure to coal dust, and that this conclusion implies that the Miner is 100% disabled from returning to coal mine employment or similar dusty occupations. His rational is that the Claimant should not return to a dusty environment so as not to exacerbate his pneumoconiosis. An opinion of the inadvisability of returning to coal mine employment because of pneumoconiosis is not the equivalent of a finding of total disability. *Zimmerman v. Director, OWCP*, 871 F.2d 564, 567 (6th Cir. 1989); *Taylor v. Evans & Gambrel Co.,* 12 B.L.R. 1-83 (1988); *Justice v. Island Creek Coal Co.*, 11 B.L.R. 1-91 (1988); *Bentley v. Director, OWCP*, 7 B.L.R. 1-612 (1984); *Brusetto v. Kaiser Steel Corp.,* 7 B.L.R. 1-422 (1984). Therefore, Dr. Baker has not accurately addressed whether Claimant's condition prevents him from engaging in his usual coal mine employment or comparable gainful employment under standards mandated by the present Act, but instead has simply recommended that Claimant not engage in these activities. Also, his documentation of limitations on Claimant's residual exertional capacity necessary to perform his duties as a coal miner is virtually non-existent. As a result, despite his qualifications as an internist and pulmonologist, I find that Dr. Baker's conclusion of total disability does not constitute a reasoned and documented medical opinion.

[21] Mere designation of a Claimant's pulmonary impairment as a Class I or II impairment does not warrant a finding of total disability under the Act absent a well reasoned and well documented opinion that the standards of the Act have been met.

Drs. Hussain, Dahhan, and Broudy all concluded that Claimant was not totally disabled from a pulmonary standpoint. These physicians are all internists and pulmonologist, and their disability conclusions are supported by the objective evidence in the record. As a result, I find that their opinions concerning total disability are well-reasoned and well-documented.

Taken as a whole, the newly submitted medical narrative evidence does not support a finding of total pulmonary disability. Claimant has not proven by a preponderance of the evidence that he is totally disabled due to pneumoconiosis. Therefore, I find the Claimant has failed to establish total pulmonary disability or total disability due to pneumoconiosis under § 718.204(b)(iv).

Claimant has failed to establish that he is totally disabled under subsection (b)(i)-(iv). Therefore, after weighing all of the newly submitted medical evidence concerning total disability under §718.204 (b), I find that Claimant has failed to establish that he is totally disabled due to pneumoconiosis.

Entitlement

The Claimant, Mr. Feltner, has failed to establish a material change in conditions sufficient to meet the statutory requirements of § 725.309(d) because he has failed to prove he suffers from pneumoconiosis, or that he is totally disabled due pneumoconiosis. Therefore, Mr. Feltner is not entitled to benefits under the Act.

Attorney's Fees

An award of attorney's fees is permitted only in cases in which the claimant is found to be entitled to benefits under the Act. Because benefits are not awarded in this case, the Act prohibits the charging of any fee to the Claimant for the representation and services rendered in pursuit of the claim.

ORDER

IT IS ORDERED that the claim of Eugene Feltner for benefits under the Act is hereby DENIED.

A

THOMAS F. PHALEN, JR.
Administrative Law Judge

NOTICE OF APPEAL RIGHTS

Pursuant to 20 C.F.R. § 725.481, any party dissatisfied with this Decision and Order may appeal it to the Benefits Review Board within 30 days from the date of this decision, by filing notice of appeal with the Benefits Review Board, P.O. Box 37601, Washington, D.C. 20013-7601. **A copy of a notice of appeal must also be served on Donald S. Shire, Esquire, Associate Solicitor for Black Lung Benefits, Frances Perkins Building, Room N-2117, 200 Constitution Avenue, NW, Washington, D.C. 20210.**